

Given its past construction of the statute, the Commission could hardly reverse its entire argument now and claim, in flat contradiction to its earlier position, that a LEC should be exempted from Cable Act franchising even when it does (whether through the parent company or through an affiliate) provide to subscribers video programming it has selected.

Similarly, the LECs (and one public service commission) who supported the Commission's position in the earlier appeal argued that Title VI's treatment of telephone companies:

provides strong evidence that Congress intended telephone common carriers to be regulated as cable operators only where the telephone company itself transmits video programming to subscribers in the manner of an ordinary cable operator.⁴²

Moreover, those intervenors stated plainly that:

[t]he reason a telephone company providing channel service does not require a franchise is because it is not responsible for the "transmission" of programming to subscribers. The same rule should apply to a telephone company providing video dialtone service.⁴³

It is fatuous for LECs to argue now that the mere insertion of their own affiliates between the system delivery function and

therefore cannot function as cable operators"), 26 ("Unlike cable operators, moreover, the LECs providing video dialtone service will not be permitted to select or to have a cognizable interest in the video programming that is sent on their facilities"), 27 ("This requires the cable operator to engage in program selection -- an activity that the LEC provider of video dialtone service is prohibited from doing"), 28 (assumption that the operator selects the programming is not valid with respect to video dialtone service), 37 (equipment used to select and provide video programming is not controlled by the LEC).

⁴²Joint Brief for Intervenors in Support of Respondents at 19, NCTA, 33 F.3d 66.

⁴³Id. at 30; see also id. at 33-34.

the program selection function makes any difference with respect to the applicability of the Cable Act. Far from supporting the LECs' current claims, the Commission's and the Court's past decisions mandate that a self-programming video dialtone system is a "cable system" under Title VI.

E. No Prior Authorization Granted to LECs Excuses Them From the Cable Act's Franchise Requirement.

Perhaps sensing the weakness of their statutory arguments, some LECs suggest that they already have authorizations allowing them to use the public rights-of-way for video dialtone.⁴⁴ As the Coalition has pointed out, however, any current authorizations the LECs may have do not extend to such use.⁴⁵ To the contrary, the law is clear that a franchise granted to use rights-of-way to provide a particular service does not allow the franchise holder, must less any of its affiliates, to use the rights-of-way to provide any other service.⁴⁶

⁴⁴See, e.g., Bell Atlantic Comments at 15; GTE Comments at 33; NYNEX Comments at 11; USTA Comments at 21-22.

⁴⁵Coalition Comments at 25-26.

⁴⁶Each LEC is in public rights-of-way only by reason of "a franchise [which] is a special privilege of a public nature conferred by governmental authority . . . and that privilege did not belong to individuals generally as a matter of common right." 12 McQuillin on Municipal Corporations § 34.04 (3d ed. 1986) (emphasis added). As a rule, such franchises are to be narrowly construed. Charles River Bridge v. Warren Bridge, 11 Pet. (36 U.S.) 420, 546, 549-50 (1837); Richmond v. Chesapeake & Potomac Tel. Co. of Va., 205 Va. 919, 923, 140 S.E.2d 683, 686 (1965) (language of franchise must be taken most strongly against grantee); 37 C.J.S., "Franchises," § 21(b); 3 Sutherland on Statutory Construction § 64.07 (5th ed. 1992). "[W]hatever is not unequivocally granted is withheld; nothing passes by mere

The Cable Act's franchising requirement contains no exception for entities that may already be authorized to use the public rights-of-way for other purposes. Hence, Title VI still requires a cable franchise for a self-programming video dialtone operator. As the Act makes clear, a cable franchise is distinct from any other kind of authorization:

the term "franchise" means an initial authorization, or renewal thereof (including a renewal of an authorization which has been granted subject to section 546 of this title), issued by a franchising authority, whether such authorization is designated as a franchise, permit, license, resolution, contract, certificate, agreement, or otherwise, which authorizes the construction or operation of a cable system.⁴⁷

Thus, to satisfy the franchise requirement of Title VI, an entity must have an authorization to construct or operate a cable system. The Coalition is not aware of any case in which a LEC's authorization to use public rights-of-way for telephony includes an express authorization to use those rights-of-way for a cable

implication." Knoxville Water Co. v. Knoxville, 200 U.S. 22, 34 (1906); accord, Blair v. Chicago, 201 U.S. 400, 471 (1906). Thus, for example, a franchise for illuminating gas does not encompass the right to provide gas for heating, even though the same pipes may be used. Hanford v. Hanford Gas & Pwr. Co., 169 Cal. 749, 147 Pac. 969 (1915); Washtenaw Gas Co., 23 P.U.R.(N.S.) 226 (Mich. 1938). Similarly, a franchise for overhead trolley wires does not encompass the right to use those overhead wires for electric distribution. Carthage v. Carthage Light Co., 97 Mo. App. 20, 70 S.W. 936, 938 (1902). A long distance telephone franchise does not encompass the right to provide local exchange service. Mitchell v. Dakota Central Tel. Co., 246 U.S. 396 (1918). See also Hawaiian Elec. Co., 87 P.U.R.4th 227, 232 (Hawaii 1987) (electric company's ducts in public rights-of-way cannot be used for the communications of others).

⁴⁷47 U.S.C. § 522(9).

system as well. On the contrary, Congress intended the cable franchise to be distinct from any such telephone authorization:

The term ["franchise"] does not include any authorization issued under section 214 of the Communications Act of 1934, or under any provision of any state law regarding the construction or extension of the facilities of communications common carriers.⁴⁸

This sharp distinction is reinforced by the separation in state law between telephone service regulation and cable franchising, as noted in the Coalition's initial comments.⁴⁹ As described below, these two types of authorization serve different purposes, even if some of the concerns underlying them may overlap.

Nor should the Commission assume that all LECs currently have valid authorizations to use the public rights-of-way for telephone service. Only one of the commenting LECs makes more than a bald assertion in this respect, and that one merely points to state laws that require such authorizations, as opposed to actually presenting evidence of the necessary grants.⁵⁰ In fact, however, authorizations for telephone service were often made so

⁴⁸House Report at 45, 1984 U.S.C.C.A.N. at 4682 (emphasis added). See also NCTA Comments at 30.

⁴⁹See Coalition Comments at 25 & n.33. For example, in California, telephone franchising is regulated at the state level, see Cal. Pub. Util. Code §§ 216 and 701, while cable franchising is regulated at the municipal level in accordance with Cal. Gov't. Code § 53066. Similarly, telephone franchising in Vermont is regulated in accordance with Vt. Stat. Ann. T.30, § 2502, while cable franchising is regulated in accordance with Vt. Stat. Ann., T. 30, § 503. See also Ann. Code of Md., Art. 78, §§ 1 and 2 (telephone) and Art. 23A, § 2(b)(13) (cable); Rhode Island Gen'l Laws § 39-1-30.1 (telephone) and § 39-19-3 (cable); and Code of Va. § 12.1-12 (telephone) and § 15.1-23.1 (cable).

⁵⁰See NYNEX Comments at 11 & n.13.

long ago, in such roundabout ways, that it is extremely unclear whether they remain in effect. In at least some cases, it appears that the LECs' original authorizations have expired by their own terms, or by action of law.⁵¹ Thus, the LECs have not even established the predicate for their own argument: that they have valid authorizations everywhere to use the public rights-of-way for any purposes, much less that any such authorizations extend to video dialtone.⁵²

It is long past time to review the status of the LECs' authorization to use public rights-of-way. As the President of the U.S. Conference of Mayors has pointed out, "[i]t is ludicrous to assume that an 1890 right-of-way grant to build a local telephone system provides a community adequate protection in 1995 in the face of these construction projects."⁵³ Certainly there is no valid policy reason why the LECs should be able to parlay

⁵¹See, e.g., In re Application of New Jersey Bell Telephone Company For Authority pursuant to Section 214 of the Communications Act of 1934, as amended, to construct, operate, own, and maintain advanced fiber optic facilities and equipment to provide video dialtone service within a geographically defined area in Dover Township, Ocean County, New Jersey, File No. W-P-C-6840, Reply to Opposition to Petition of the New Jersey Cable Television Association to Deny at 23-26 and Exhibit B (Declaration of Jerold Clark) at ¶ 6 (Feb. 16, 1993) (Bell Atlantic appears to have lacked authorization to use the public rights-of-way for local exchange facilities in Dover Township, Delaware, since at least 1956).

⁵²The scope of any such authorization is, of course, a question of state and local law not before the Commission to adjudicate.

⁵³Letter from Victor Ashe, President, U.S. Conference of Mayors, to Reed E. Hundt, Chairman, Federal Communications Commission at 1 (Jan. 10, 1995).

grants made a century ago, under radically different economic and technological conditions, and to provide an entirely different sort of service, into a free ride for video dialtone construction in local communities' rights-of-way.

F. LECs' Other Arguments Against Local Franchising Fare No Better Than Their Attempts to Rewrite the Statute.

In addition to their attempts to substitute their own language for that of the statute, the LECs present several other smokescreens in an attempt to persuade the Commission to immunize self-programming video dialtone operators from Title VI. These arguments fare no better than the LECs' statutory arguments.

Three LECs appear to suggest that franchising of a self-programming video dialtone operator is per se unconstitutional.⁵⁴ Yet LECs ignore a wealth of court decisions upholding the very franchise requirements about which they complain.⁵⁵ LECs also

⁵⁴See NYNEX Comments at 11; BellSouth Comments at 33-35; U S West Comments at 10 n.17. BellSouth appears to expand this notion into an argument that the First Amendment guarantees it total editorial control of its facilities, because conditions such as must-carry and PEG access would "heavily burden" BellSouth's own provision of programming. Such an argument proves too much: if valid, it would demonstrate that there can be no such thing as a communications common carrier, for no "speaker" could be required to give access to any other speaker.

⁵⁵See, e.g., Daniels Cablevision, Inc. v. U.S., 835 F. Supp. 1 (D.D.C. 1993) (upholding PEG access and other provisions of 1984 and 1992 Cable Acts); Erie Telecommunications, Inc. v. City of Erie, 659 F. Supp. 580, 593-602 (W.D. Pa. 1987), aff'd, 853 F.2d 1084 (3d Cir. 1988) (upholding franchise fees and PEG access); Telesat Cablevision, Inc. v. City of Riviera Beach, 773 F. Supp. 383 (S.D. Fla. 1991) (upholding franchise requirements); Group W Cable, Inc v. City of Santa Cruz, 679 F. Supp. 977 (N.D. Cal. 1988) (upholding franchise fees).

overlook the cardinal principle that the cable franchising process cannot be subjected to constitutional assault in a vacuum, but must be attacked, if at all, based on the particular requirements and record presented in a particular case.⁵⁶ In any case, of course, the Commission does not have authority to overturn Title VI in this proceeding.⁵⁷

Moreover, the LECs that complain about the supposed burden of being subject to both Title II and Title VI forget that the option of obtaining a franchise and becoming a cable operator remains open to them, as long as the Commission does not require them to provide a video dialtone platform.⁵⁸ There can be no First Amendment problem associated with dual regulatory schemes as long as LECs have the option of pursuing the pure cable route.

GTE appears to suggest that local franchising is unnecessary because an excise tax on video programmers satisfies local communities' right to fair compensation.⁵⁹ As noted above, however, such a tax is inherently different from compensation for use of public property.⁶⁰ Nor does it provide full compensation for the uses made of the rights-of-way by the entire system,

⁵⁶See FCC v. Beach Communications, Inc., 959 F.2d 975, 976-77, 983-85 (D.C. Cir. 1992).

⁵⁷See Southwestern Bell Corp. v. FCC, 43 F.3d at 1519 ("Congress enacted the Communications Act and the mandates of the Act are not open to change by the Commission").

⁵⁸See Coalition Comments at 12-14.

⁵⁹GTE Comments at 35.

⁶⁰See note 8 supra.

since, unlike a cable system's franchise fee, it is limited to the revenues of customer-programmers on the system. While the Coalition has no objection to grants of taxing authority, such authority is fundamentally distinct from local governments' right to charge rent for use of local public rights-of-way.⁶¹

BellSouth seeks to resurrect an argument made by the Commission, but not reached by the NCTA court, as an independent argument against local franchising. In this argument, the Commission suggested that the division of headend facilities between carrier and programmers in a pure video dialtone system meant that there was no "unified, integrated system of facilities" that would constitute a cable system.⁶² However, this argument also fails when applied to a self-programming video dialtone operator. Such an operator, by definition, will have its own programming facilities connected to the common carrier platform, forming a single integrated headend. The fact that other, independent programmers may also have their own equipment connected to the video dialtone operator's facilities does not change this analysis. Such an operator is in exactly the same position as many cable operators are today. The headends of many cable operators today receive direct wireline feeds from local

⁶¹See, e.g., City of St. Louis v. Western Union Telegraph Co., 148 U.S. 92 (1893); Pacific Tel. & Tel. Co. v. City of Los Angeles, 44 Cal. 2d 272 (1955) (franchise fee is "not a tax" but rather "compensation for the privilege of using the streets and other public property within the territory covered by the franchise").

⁶²BellSouth Comments at 27-28 (quoting Brief for Respondents at 22, 38-39, NCTA, 33 F.3d 66).

program providers, such as PEG upstream feeds, leased access feeds, and even local broadcast signal feeds. Yet a cable operator whose headend is connected to such wireline feeds remains a cable operator, just as it remains a cable operator even when it does not control all of the programming on its system.

Bell Atlantic raises a somewhat different argument based on the notion that its programming subsidiary, Bell Atlantic Video Services Company ("BVS"), might be required to obtain a cable franchise. According to Bell Atlantic, if other programmers on the system are not also required to obtain franchises, BVS would be discriminated against, violating the First Amendment and the equal protection clause of the Fifth Amendment.⁶³

This argument is a red herring. Under Bell Atlantic's scenario, Bell Atlantic would require a cable franchise if it provides programming on its own system through BVS. This is because Bell Atlantic would be providing cable service over a cable system, would own a significant interest in the system, and in addition would control and be responsible for the operation of the system. Thus, Bell Atlantic would be a "cable operator." Under the Cable Act, each cable operator must obtain a franchise.⁶⁴ Thus, the franchising requirement applies to the operator and its system as a whole. While some services may be

⁶³Bell Atlantic Comments at 19-20. Cf. Pacific Telesis Comments at 7-8 and SBC Comments at 15-16 (programming subsidiaries should not be franchised).

⁶⁴See 47 U.S.C. §§ 522(5), 541(b)(1).

subject to common carrier regulation and some not, cable franchising involves many aspects that necessarily relate to the entire system, such as the establishment of requirements for facilities and equipment pursuant to local needs and interests.⁶⁵

However, even if Bell Atlantic were correct that only BVS required a franchise, its discriminatory treatment claim is unfounded. BVS would be fundamentally different from all other programmers on the system because only BVS would be under common control and ownership with the video dialtone system.⁶⁶ This significant organizational and economic difference, under the definitions in Title VI, results in different regulatory treatment.⁶⁷ Moreover, to the extent that Bell Atlantic's status as a common carrier might mistakenly be thought to immunize Bell Atlantic from Title VI, that immunity certainly does not extend to BVS, which is not a common carrier.⁶⁸ Thus, even if it were supposed that Bell Atlantic (the video dialtone operator) were

⁶⁵See 47 U.S.C. §§ 544(b), 546(c)(1); House Report at 26 ("The ability of a local government entity to require particular cable facilities (and to enforce requirements in the franchise to provide those facilities) is essential if cable systems are to be tailored to the needs of each community"). As noted in the Coalition Comments at 28-39, the Commission cannot, as a practical matter, take over the determination of local needs and interests for each individual community in the United States.

⁶⁶See Limited Further Comments of the Association of Independent Television Stations, Inc., at 11-12 (March 21, 1995) ("INTV Comments"); United Video Comments at 2-4.

⁶⁷See 47 U.S.C. § 522(5).

⁶⁸As shown at n. 46 above, franchises in the public rights-of-way are limited both to the particular entity granted the franchise and to the public purpose specified therein.

not subject to the franchising requirement of the Cable Act, BVS would be, due to its participation through an affiliate in the ownership and management of the system.

Finally, some LECs argue that 47 U.S.C. § 541(c) precludes a common carrier's system from being a cable system.⁶⁹ Section 541(c) provides:

Any cable system shall not be subject to regulation as a common carrier or utility by reason of providing any cable service.⁷⁰

This provision, however, does not imply that a cable system . cannot be subject to common carrier regulation, much less that a self-programming video dialtone operator cannot become a cable system. If that were the meaning, the sentence would have ended with "utility." Rather, Section 541(c) merely makes clear that a cable system may not be regulated as a common carrier based solely on the fact that it provides cable service. In other words, cable service alone is not grounds for common carrier regulation. A cable system may still be regulated as a common carrier on the grounds of other functions performed by the cable system, consistent with 47 U.S.C. § 541(c). Thus, even if the Commission were to hold that a self-programming video dialtone operator must be treated as a common carrier, § 541(c) would not excuse that operator from meeting the statutory requirements of § 541(b) (the franchising requirement).

⁶⁹See, e.g., U S West Comments at 24, 28-29.

⁷⁰47 U.S.C. § 541(c).

**III. TITLE VI MAY CONSISTENTLY BE APPLIED TO
SELF-PROGRAMMING VIDEO DIALTONE OPERATORS.**

The LECs argue that applying Title VI to a self-programming video dialtone operator would be either inconsistent with common carriage, redundant, or both. These claims, however, also fail to provide the LECs with an escape hatch from the franchise requirement of the statute.

To begin with, to the extent the Commission's video dialtone rules may be inconsistent with Cable Act requirements, it is the Commission's rules, not the statute, that must bend. If the Commission's video dialtone construct is inconsistent with the language of Title VI, video dialtone must go; if self-programming video dialtone is inconsistent with Title VI, the Commission cannot approve it.⁷¹ The LECs, however, have greatly exaggerated the difficulties of applying Title VI to self-programming video dialtone. Aside from vague and unsupported assertions, the substantive issues raised by the LECs appear to break down into a few key questions.

**A. Title II Does Not Address
The Same Concerns As Title VI.**

The LECs claim that Title II already addresses the same concerns as does Title VI regarding public safety and convenience and use of the public rights-of-way.⁷² As an initial matter,

⁷¹See Coalition Comments at 56 & n.75.

⁷²See, e.g., Ameritech Comments at 12 n.31; Bell Atlantic Comments at 18 n.44; Pacific Telesis Comments at 6-7.

LECs overlook that Title II could not possibly address the same concerns as Title VI. Title II deals only with interstate common carrier service. It does not grant -- nor could it be construed to grant -- any right to an interstate common carrier to appropriate locally-owned public property for the carrier's own use.

Moreover, even if Title II addressed some of the same public interest concerns as Title VI for a pure video dialtone system, it is certainly not sufficient for a self-programming video dialtone operator. Such an operator would perform all the functions of a traditional cable operator and would use the public rights-of-way in the same ways as a traditional cable operator. If Title II fully addressed the concerns that Congress thought relevant in the Title VI context, the obvious question is why Congress ever created Title VI instead of simply requiring cable operators to abide by Title II.

The reason, of course, is that Title VI, unlike Title II, reflects Congress' view that local video delivery systems must be responsive to local community needs and interests. At least one LEC, GTE, begrudgingly concedes that local needs and interests must be addressed.⁷³ But GTE's itemization of five areas of local interest -- construction, PEG access, emergency alert systems, redlining, and subscriber privacy -- does not include

⁷³GTE Comments at 34-35. Cf. USTA Comments at 21-22 (LECs are subject to local regulations, authorizations, and payments); Comments of the Cable Telecommunications Association at 7 (March 21, 1995) ("CATA Comments") (telephone authorizations are no substitute for cable franchises, which address local needs).

all the local needs and interests that the Cable Act was intended to protect. On the contrary, the record makes clear that these local needs and interests are far more diverse and varied than GTE's simplistic categorization suggests.⁷⁴ As the Coalition has pointed out, these concerns simply cannot be adequately addressed by cookie-cutter federal regulation alone.

Nor, as GTE suggests, are merely voluntary efforts by the LECs sufficient to meet these local needs and interests. Indeed, the Cable Act rests on the principle that the operator cannot be relied upon to determine unilaterally what local needs and interests should be served. Rather, Title VI is based on the notion that local communities must be able to negotiate reliable and enforceable commitments from the system operators serving their citizens. The almost complete absence of any consideration of local needs and interests in the video dialtone applications submitted by LECs to date simply underscores why the Cable Act is needed.

As the Coalition has noted, the contrast between the fruits of local franchising and what LECs have accomplished is particularly striking in the case of the nation's schools.⁷⁵ For example, recent reports from GAO and the congressional Office of Technology Assessment (OTA) note that half of the nation's schools reported inadequate phone lines, and in particular that

⁷⁴See, e.g., Michigan Communities' Comments at 17-48; NATOA Comments at 12-27; Comments, City of Coral Springs, Florida, at 3-4; Coalition Comments at 28-39.

⁷⁵Coalition Comments at 30-32 and Appendix A.

more than 60% of inner-city schools reported insufficient networks and phone lines. Only one teacher in eight even had access to a telephone in the classroom.

In contrast, less than 32% of schools reported inadequate access to cable television.⁷⁶ And the cable industry has estimated that over 63,000 schools in the United States are provided with free cable service, while a survey of U.S. school districts indicates that 80% of these districts are using cable services for instructional purposes.⁷⁷

Indeed, to the extent that true broadband interactive networks are now being tested, it appears that people's ability to reach local services, from town meetings to local sales and theater schedules, and to communicate freely with their neighbors, may bulk larger in importance than access to the Library of Congress or the Louvre, much less QVC.⁷⁸ If a true broadband information highway is to develop -- capable of enabling people to communicate with and have access to local information sources -- the community must be able to ensure that the system is structured in a way that meets local needs and interests.

⁷⁶Congressional Agencies Find Little Help for Educational Telecommunications, April 7, 1995, Communications Daily at 2-3.

⁷⁷Washington Post, April 9, 1995, at K37.

⁷⁸Rajiv Chandrasekaran, "In Virginia, a Virtual Community Tries Plugging Into Itself," Washington Post April 11, 1995, at A1, A12.

**B. Cable Act Requirements Regarding Programming
Are Consistent With the Role of a
Self-Programming Video Dialtone Operator.**

Some LECs argue that their role as common carriers somehow prevents them from having anything to do with Title VI requirements that involve control over programming. Thus, for example, GTE insists that it has the right to program on its system, yet professes an inability to provide PEG channels because that would involve control of programming -- apparently on the pretext that only GTE's affiliate can control programming, while GTE as system operator cannot.⁷⁹ Similarly, Bell Atlantic claims that it cannot provide a basic tier offering because it is a common carrier.⁸⁰ In other cases, LECs allege that must-carry requirements conflict with common carriage.⁸¹

This argument is fundamentally incompatible with the LECs' companion claim that they are now free to provide their own programming over these same common carrier systems, whether or not through an affiliate. Thus, if a LEC can sell capacity to an affiliate that carries HBO in its program package, it may also convey capacity to an affiliate that carries PEG channels or that provides a basic tier. Nothing prevents a self-programming video

⁷⁹See GTE Comments at 3 (LECs may provide programming on traditional cable or video dialtone systems), 28-30 ("the VDT transport provider is barred from so involving itself in programming" as to provide PEG channels). See also SBC Comments at 18.

⁸⁰Bell Atlantic Comments at 18 n.44.

⁸¹See, e.g., BellSouth Comments at 31-33; GTE Comments at 28-29.

dialtone operator from accomplishing such franchise-related responsibilities either through an affiliate, or through an unaffiliated programmer. Thus, a LEC might not need to put on a basic tier itself if another programmer were already doing so (as seems likely).

Similarly, a self-programming video dialtone operator can meet its must-carry obligations under the Cable Act either through an unaffiliated programmer's decision to carry a broadcast channel, or by doing so through its own programming affiliate. To the extent that such carriage requirements might burden the limited channel capacity allotted to a LEC under the Commission's rules, the Commission is certainly in a position to take such factors into account. Thus, for example, a LEC might be limited to self-programming 25% of its capacity plus any channels devoted to must-carry or PEG requirements. In this way, the apparent incompatibility that alarms the LECs may readily be resolved.⁸²

C. Cable Act and Common Carrier Requirements Do Not Conflict.

Many LECs object that meeting both common carrier and Cable Act requirements would be unduly burdensome. Again, to the

⁸²SBC's notion that an obligation to provide parental control devices under 47 U.S.C. § 532(j) might somehow conflict with common carriage, SBC Comments at 18, is even more chimerical. SBC confuses control of programming by the carrier with control of programming by the subscriber. Surely common carriage does not imply an obligation to force programming upon a recipient who wishes to block or screen it.

extent that the decisions striking down the cross-ownership prohibition allow LECs to become pure cable operators rather than video dialtone operators, the LECs possess the key to their own jail: They can always choose to become pure cable operators and avoid such dual regulation. Yet it is difficult in any case to see why LECs cannot operate under both sets of rules. The possible relationships of these rules seem to fall into the three following categories:

(1) Common carrier rules apply to a LEC as a corporate entity, although it provides pure cable service. Many LECs face dual regulation now. Indeed, all LECs currently providing cable service under the rural exemption are subject to both Title II and Title VI. Moreover, these are generally small rural LECs. It is hard to see why the large RBOCs are somehow unable to shoulder the burdens that their smaller siblings are already carrying.

(2) Cable Act and common carrier requirements overlap. If two sorts of requirements overlap, then meeting the higher of the two standards imposes no new burden on the operator, since meeting the higher standard also satisfies the less stringent one. Thus, for example, if cable customer service standards require that customer telephone calls be answered within thirty seconds, and telephone service standards require that they be answered within forty, the LEC will already have fulfilled the

forty-second standard by fulfilling the thirty-second standard.⁸³ Similarly, there should be no difficulty in meeting the more stringent of two sets of subscriber privacy standards.⁸⁴

Such overlapping standards might be referred to as "redundant," in the sense that backup systems in a spacecraft are redundant: If one should fail, the other kicks in. This does not make such standards difficult to apply, or even more onerous for the operator. It is probably the case, for instance, that if a self-programming video dialtone operator offers sufficient capacity on its system at reasonable rates, it might well exceed its leased access obligations under the Cable Act. But that simply means that every video dialtone system automatically satisfies the leased access requirement through its common carriage requirements. There is no conflict or burden in being subject to both.⁸⁵

(3) Cable Act and common carrier standards are cumulative. In a third set of cases, Title VI may simply impose further requirements in addition to those of a telephone common carrier. Thus, for example, the requirements that relate to corporate

⁸³Cf. SBC Comments at 19 (alleging difficulty in meeting two sets of customer service standards).

⁸⁴See GTE Comments at 29; U S West Comments at 43.

⁸⁵It should be noted, however, that common carriage, by itself, satisfies only those Cable Act obligations that are designed to ensure nondiscriminatory carriage. It does not necessarily satisfy requirements designed to ensure affordable carriage, such as PEG requirements (which may be viewed as part of the community's compensation for use of the public rights-of-way), much less other obligations not related to program carriage, such as franchise fees.

behavior and relationships, such as program access, the broadcast ownership ban, equal employment opportunity, program carriage, vertical integration, and PEG access, merely represent additional obligations a LEC must assume if it wishes to become a video programmer on its own system.

Similarly, facilities requirements may be negotiated in local franchises, allowing communities to ensure that a system will meet local needs and interests (in addition to the national public interest as defined by the Commission). Such requirements may augment system requirements, but need not conflict with any other requirements.

BellSouth seeks to create such a conflict, but it does so only by assuming that facilities requirements negotiated in a franchise agreement would apply only to the portion of the system programmed by BellSouth's affiliate, not to the entire system.⁸⁶ Such requirements in cable franchises, however, apply to the entire cable system, despite the fact that some capacity (such as leased access, must-carry, and PEG channels) may be programmed by parties other than the cable company. In the end, BellSouth's example merely succeeds in making clear why it is the video dialtone operator, not merely its programming affiliate, that must obtain the franchise required by the Cable Act.

Additional obligations unique to Title VI, such as program access and facilities requirements, may be unwelcome to a LEC,

⁸⁶BellSouth Comments at 33.

but that does not make them "unintelligible," in GTE's phrase.⁷ Nor are they unduly burdensome. To the extent that LECs wish to have the benefits of both roles -- common carrier and video programming provider -- they cannot legitimately complain if they are required to bear the burdens Congress assigned to both, particularly as long as they also have the option, as the Coalition believes they should, of choosing the pure cable route.

To the extent the LECs may argue that the burdens of this dual role outweigh the advantages, they are free either to stick with pure video dialtone common carriage or to become pure cable operators. If it should develop that pure common carriage is economically unattractive compared with the ability to program part of system capacity (which requires a cable franchise), the Commission should accept this fact rather than prejudging the market. The proper solution is to allow all these options and let the market determine which is better.

Cable franchises and telephone authorizations serve distinct purposes. Both sets of purposes, and hence both sets of regulations, are applicable to any LEC that wishes to play both roles. Title VI, which was intended to protect the policies that underpin local franchising,⁸ delineates safeguards that are required for a self-programming video dialtone operator to

⁷GTE Comments at 30. At least one potential programmer, in fact, has expressed concern regarding program access issues on a video dialtone system. See Comments of Entertainment Made Convenient ("Emc³") U.S.A., Inc., at 17-18 (March 21, 1995).

⁸See Coalition Comments at 5-39.

operate in the public rights-of-way and to place it on a competitive level with its other cable competitors.

IV. FAIR COMPETITION REQUIRES FURTHER CONDITIONS BASED ON THE DUAL NATURE OF A SELF-PROGRAMMING VIDEO DIALTONE OPERATOR.

The foregoing analysis does not rule out the possibility that safeguards in addition to Title VI may be needed for a self-programming video dialtone operator, due, for example, to concerns about LEC market power. For example, various commenters suggest that structural separation⁸⁹ and open network architecture⁹⁰ are essential protections. Three other specific protections deserve reply comment.

A. The Section 214 Process Properly Applies To Video Dialtone.

Several LECs argue that the Commission cannot require them to obtain section 214 approval to build or operate video dialtone systems.⁹¹ To the extent that section 214 requires Commission approval for facilities construction by common carriers generally, however, it applies here just as it does for other construction by the LECs. Like a LEC providing cable service

⁸⁹See, e.g., AT&T Comments at 12-13 (March 21, 1995); Comments of Home Box Office at 5-8 (March 21, 1995); Comments of the Information Technology Association of America at 3 (March 21, 1995).

⁹⁰See, e.g., Comments of Compaq Computer Corporation at 2-4; Emc³ Comments at 22-23.

⁹¹See, e.g., Ameritech Comments at 13; GTE Comments at 16-22; USTA Comments at 14 n.23.

under the rural exemption, a self-programming video dialtone operator must comply with common carrier rules as well as cable operator rules.⁹² Moreover, if the Commission were to conclude that Title VI did not require a self-programming video dialtone operator to obtain a local franchise (even though, as shown above, such a conclusion would be contrary to the statute), the section 214 process would be crucial. In such a case, that process would be the only opportunity local communities would have to address their needs and interests. Thus, while the section 214 process cannot take the place of local franchising, eliminating both processes would represent a complete abdication by the Commission of its duty to protect the public interest.

These principles govern the answers to the Commission's April 3, 1995, questions regarding "blanket Section 214 authorization" of video dialtone systems.⁹³ Local communities must be able to require self-programming video dialtone operators to address local needs and interests. To the extent this purpose is accomplished through local franchise negotiations, a blanket Section 214 process for self-programming video dialtone operators might be acceptable. On the other hand, to the extent any locality does not have an opportunity to address local needs and

⁹²LECs operating under the rural exemption, for example, have long been required to apply under Section 214. See, e.g., National Cable Television Ass'n, Inc. v. FCC, 747 F.2d 1503, 1508 (D.C. Cir. 1984). It is difficult to see why the larger LECs should be exempted from what small LECs have long had to do.

⁹³Public Notice: Supplemental Comments Sought on Possible Grant of Blanket Section 214 Authorization, CC Docket No. 87-266, DA 95-665 (April 3, 1995).

interests in local franchise negotiations (for example, in the case of a pure video dialtone operator under NCTA), the public interest requires the Commission to make a comprehensive determination, specific to each community, of whether and how the proposed system meets local needs and interests, allowing for full participation by local governments and members of the community. This is true whether the proposed facility would be used to provide telephony services or to provide only cable services.

**B. Acquisition of Cable Systems By LECs
Should Be Permitted Only With Great Caution.**

Several LECs argue that they have a constitutional right to acquire cable systems.⁹⁴ Cable interests also favor allowing telco-cable buyouts, for obvious reasons.⁹⁵ However, as noted in the Coalition's initial comments, the Commission has authority to regulate such acquisitions.⁹⁶ Because telco-cable acquisitions would tend to erode competition rather than promote it, and hence would do little or nothing to achieve the Commission's professed procompetitive goals for video dialtone, a lax policy on buyouts

⁹⁴See, e.g., Bell Atlantic Comments at 28 n.69; GTE Comments at 22-23; USTA Comments at 26-27.

⁹⁵See, e.g., NCTA Comments at 59-61.

⁹⁶See Coalition Comments at 14-15. See also North Dakota State Board of Pharmacy v. Snyder's Drug Stores, Inc., 414 U.S. 156, 166-167 (limitations on ownership may constitutionally be imposed).

would be inadvisable.⁹⁷ The Coalition supports the position taken on these issues in the Michigan Communities' Comments at 49-58.

C. Cable Operators Should Have the Same Options As Telephone Companies.

Both LECs and cable operators claim that cable companies should also be permitted to provide video carriage on a common carrier basis under the video dialtone rules.⁹⁸ This would be possible, however, only in the unlikely event that traditional cable operators were willing to transform themselves into pure common carriers, not exercising any control over programming, through an affiliate or otherwise. The same conditions must apply to traditional cable operators as to existing LECs. Thus, in order to become a video dialtone operator, a cable operator would need to provide common carriage. At the same time, however, such an entity would remain a cable operator as long as it continued to program any part of its own system, in the same way that, as noted above, a LEC that programs any part of its own system is also a cable operator. Traditional cable operators

⁹⁷The Administration has also made this point forcefully. See, e.g., Edmund L. Andrews, G.O.P. to Delay a Vote on Communications Bill, N.Y. Times, April 5, 1995, at D1, D5 (Vice President Gore objects to similar buyout provision in proposed legislation, "arguing that such purchases would only strengthen monopoly power in communications").

⁹⁸See, e.g., Bell Atlantic Comments at 20 n.48; NCTA Comments at 58-59.